IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO.1433 OF 2005

Vasant Anant Acharekar .. Appellant

Versus

Mrs.Subhada Shekhar Haldankar

and Ors. .. Respondents

Mr.Karande i/b. Mr.G.H.Keluskar for appellant

Mrs.Mudbidri for respondents.

CORAM : S.C.DHARMADHIKARI, J.

DATE : 18th July 2007.

P.C.

. Heard Mr.Karande for appellant - original defendant No.1 and Mrs.Mudbidri for original

plaintiff. The original plaintiff filed a suit being Regular Civil Suit No.6 of 1996 in the Court of Civil Judge, Junior Division, Malvan claiming partition of the suit land described in Schedule T to the plaint and separate possession to the extent of her 6/25th share therein.

2. It is not necessary to go into any greater details because it is an admitted position that the suit which was filed in the trial court was decreed on the basis that plaintiff has 6/25th share and she is entitled to a separate possession to that extent.

3. That decree was impugned by the uncle of the plaintiff original defendant No.1 and the lower appellate court by its judgement and order in Regular Civil Appeal No.155 of 2001 delivered on 29th July 2005 concluded that the appeal is liable to be allowed partly, inasmuch as the decree should be modified and a declaration must

follow that the plaintiff and defendant Nos. 1 to 4 have 1/5th share each in the suit land by inheritance.

4. Challenging this judgement and decree the original defendant No.1 has filed this second appeal.

5. The only ground, according to Mr.Karande, which would raise a substantial question of law is that the will was propounded by the appellant - first defendant of the deceased Anant by which daughter of Anant (deceased), original plaintiff is totally excluded from the enjoyment of property. However, according to him if the principles enunciated in Succession Act and Evidence Act are applied, there is nothing suspicious about this will. Merely because original plaintiff is so excluded, he submits, that the circumstances which have been brought on record, do not in any manner show that the will

was not genuine but suspicious and, therefore, could not be relied upon. In this behalf, he places reliance upon decisions of Supreme Court,(Rabindra Nath Mukherjee and Anr. Vs. Panchanan Banerjee (dead) by Lrs. - A.I.R. 1995 S.C. 1684 and Ramabai Padmakar Patil (Dead) through Lrs. Vs. Rukminibai Vashnu Vekhande and Ors., - 2004(1) Mh.L.J. 1), Division Bench of this Court (Bhika Cullianji and Co. Vs. Avon Electric Company - 1995(1) Bom.C.R. 377) and a learned Single Judge of Madras High Court (M.S.Thanigachala Pillai Vs. Rukmani Ammal and Ors., (A.I.R. 1989 Madras 99).

6. In my view, the arguments canvassed by Mr.Karande do not give rise to any substantial question of law, inasmuch as, both courts have not relied upon the will. Concurrently, a conclusion is reached that even if there is no effective and proper cross examination, yet, the cumulative effect of all circumstances would

demonstrate that the will is not capable of being relied upon. Not only it excludes the grand daughter of the deceased from the property, but, additionally, it was found that there was a will made by the deceased in 1984 which will, according to parties, was cancelled. The new will now propounded is dated 8th February 1988 (Exh.84). Although subsequent in point of time, it makes no reference to any cancellation apart from the fact that it is not registered. The will is in English language. The Testator was residing at Malvan all through out and speaking Marathi language. He was having his properties i.e. agricultural land, flour mill Mango Orchids etc. thereat. However, the will (Exh.84) is executed at Sion, Mumbai. Further, the Doctor is not examined. There is nothing in the Testimony of the attesting witness, who was examined, proving execution of the will. In such circumstances, I do not find that the concurrent findings based upon these materials and

circumstances are vitiated as contended by Mr.Karande. In Supreme Court decisions itself, the settled principles are set out. The Supreme Court holds that a circumstance would be suspicious when it is abnormal or is not normally expected in a Normal Situation or is not expected of a Normal Person (see A.I.R. 1982 S.C. 133 Smt.Indu Bala Bose & Ors. Vs. Maninchandra Bose and Anr). This decision has been followed and referred subsequently. In the light of these principles, if the circumstances concurrently brought out are considered, they are abnormal and therefore, suspicious. Hence, the will (Exh.84) is rightly discarded.

7. Reliance upon other Supreme Court decisions is misplaced inasmuch as these decisions must be seen in the backdrop of peculiar facts which led the Supreme Court to observe that non examination of the Advocate or that mere exclusion of near and dear ones would

not straight away vitiate the will. In the absence of anything else, by mere non examination of the Advocate and exclusion of near and dear ones one cannot demolish the will or brush it aside is the law laid down. These are well recognised principles. However, their applicability must depend upon the facts and circumstances of each case.

8. In present circumstances, the concurrent finding of fact that the original plaintiff - grand daughter of the testator has proved that the will Exh.84 was not voluntarily executed and that is how the properties cannot be exclusively bequeathed to original defendant Nos. 1 to 4 is not liable to be interfered with in the limited jurisdiction of this Court under section 100 of C.P.C. This is not a Court of further Appeal so as to permit re-appreciation and re-appraisal of oral and documentary evidence.

9. Even otherwise, I find that the Courts below have balanced equities. The properties must now go on the basis of inheritance and not exclusively to the appellant. If that be the grievance, the decree is already modified by the lower appellate court and 1/5th share is given to the appellant before me. The appellant who is about 75 years of age should have no grievance if the property also goes to none other than his niece. This is not a fit case for interference of this Court. Second appeal is dismissed.

10. The order of status quo granted by this Court, however, to continue at the request of Mr.Karande for a further period of eight weeks.

11. In view of disposal of this appeal, all interlocutory applications are dismissed as infructuous.

(S.C.DHARMADHIKARI, J)